United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-7519

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANTHONY MUNOZ,

Plaintiff-Appellee,

against

FLOTA MERCANTE GRANCOLOMBIANA, S. A.,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

DEFENDANT-APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Cases Cited

Statute Cited

Other Authority Cited

Regulation Cited

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Issue Presented

Plaintiff-Appellee (hereinafter referred to as plaintiff) does not dispute in its brief that the issue to be decided by this Court is: Does the shipowner's duty to supply a safe place to work to a longshoreman include an unknown latent defect created by the plaintiff's employer in stowing cargo on board the shipowner's vessel.

Rule of Law to be Applied

On January 6, 1977 the United States Court of Appeals for the Third Circuit decided the case of *Henry* v. *United Overseas Marine Corporation,* F. 2d (3 Cir. 1977); No. 76-1618 (opinion annexed hereto). The Court of Appeals affirmed the Lower Court's dismissal as a matter of law on the opinion rendered by the District Court Judge. The Judge's holding we believe is the rule of law to be applied in this case, which is as follows, at pages 46A-47A, of that opinion,

> "In my view, Congress intended to relieve the vessel owner of liability for the negligent performance by the stevedore of the work which the stevedore was hired to do. Congress did intend to make the vessel owner liable for its own independent acts of negligence, not for the vessel owner's failure to correct the stevedore in what the vessel owner regarded as an improper method of doing work the stevedore was hired to perform."

POINT I

Discussion

Nowhere in its brief does the plaintiff dispute that any condition which may have caused the plaintiff's injury was in fact created by plaintiff's employer in its stowage of the cargo in the No. 3 hatch, lower hold, starboard side. Likewise, the plaintiff does not contend, as it could not, that the vessel owner had actual knowledge of any latent condition created by the stevedore. It is submitted that these two concessions by the plaintiff, in and of themselves, require this Court to enter judgment in favor of the defendant.

Plaintiff asks this Court to find that the shipowner has a duty to inspect the stowage of the cargo during the course of the stevedore's work; has a duty to discover latent defects in the stow of cargo loaded by the stevedore; and has the duty to give warnings of such a latent defect.

In discussing the standards of care urged by the plaintiff, the shipowner must first take issue with the complete mischaracterization of the facts as set forth by the plaintiff in their Point I. A conscious effort was made during the trial to present a clear legal question for the Court and we do not believe that there are any factual issues. The discussion, therefore, of what the shipowner describes as a mischaracterization of the undisputed facts at trial should not be considered issues of fact, but rather conclusions of the plaintiff from the undisputed facts that are not warranted.

Nearly every sentence in Point I of the plaintiff's brief in opposition is such a mischaracterization. However, for the sake of brevity, and hopefully clarity the shipowner will only discuss the most blatant examples.

1. Sentence One—"The forward and aft ends of the hatch in question were fully loaded the day before the accident."

There is no evidence to support this statement. It is true that there was cargo stowed in the forward and aft end of the No. 3 hatch, lower hold, starboard side, at 10:00 A.M. when the plaintiff first entered the lower hold on November 6th. However, the stevedores did not finish loading cargo into the No. 3 hatch until some four days later (Defendant's Exhibit J, 130A-131A). There is no evidence that additional cargo was not later stowed in either the forward or after ends. Furthermore, the plaintiff spe-

cifically denied that there was any normal procedure in loading cargo in either end of the hatch prior to cargo being loaded in the square (50A-51A).

2. Sentence Two—"The escape hatch at the aft end was blocked."

Again, there is no testimony to support this statement. The plaintiff stated that he did not go back in the aft end of the lower hold. He said there was cargo in the aft end, but he certainly did not say that the aft end ladder was blocked (53A).

3. Sentence Three—"The cargo at the foward end was so stowed that in order to provide a means of escape or leaving the hatch, particularly in the event of an emergency, a pathway was built into the stow leading from the square to the escape hatch."

Plaintiff in its brief time after time characterizes the cargo that was stowed against and aft of the forward escape hatch ladder both as a pathway to the escape hatch ladder and a means to and from the place of work. These characterizations could not be more inaccurate. The plaintiff clearly, and without contradiction, testified that the cargo stowed by UMS in the forward end of the lower hold, starboard side, was placed so that it was "inclining upwards" (54A) from a height 3 feet higher than the rolls being stowed at the forward square end to the ceiling at the forward most end of that hatch (where the forward ladder was located).

"It was leading up to the escape hatch. Then when it got to the top *there was no path.* It was just packed right up to the ceiling." (55A) (emphasis supplied).

The plaintiff specifically denied that the cargo as stowed constituted a real pathway (25A).

That the forward escape hatch and its ladder were not a means of entrance to and exit from the place of work in the forward square of the lower hold was unequivocally testified to by the plaintiff in describing how he descended to the lower hold.

> "Q. Now, did you proceed down to the lower hold when you got down to the lower tween deck?"
> "A. Well, when I got down to the lower tween deck, I couldn't get down to the lower hold because the escape hatch which ordinarily we used to go down to the hold was covered with cargo."
>
> • • •
>
> "Q. What did you do then?"
> "A. Then I asked the fellows down the hold how does one get down there."
>
> • • •
>
> "Q. What did they tell you, if anything?"
> "A. They emphasized I go to midship, there was a wooden ladder coming from the upper—, the lower tween deck to the lower hold."
>
> • • •
>
> "Q. Did you go down that ladder?"
> "A. Yes, I did." (19A-20A)

While defendant believes it had no duty to the plaintiff for a condition created by his co-employees, whether or not the cargo constituted a path leading to an entrance to the hold, this is not the situation in the case before this Court.

4. Last Sentence, Paragraph 1. "Obviously the pathway was visible both from the entrance of the escape hatch and by looking down into the square from the deck."

Again, plaintiff's brief completely misstates the testimony at the trial. In addition to the quoted portions of the testimony above that the cargo was completely blocking the escape hatch entrance and, hence, no one could look into it from above, the plaintiff also specifically stated that you could not see even into the square of the hatch from the deck of the vessel, let alone underneath the forward wing of the starboard side of the lower hold. The plaintiff stated, "Only that this particular ship called for an extra deckman, because you couldn't see from the —the gangway man couldn't see down to the lower hold." (67A).

5. First sentence, Paragraph 2. "The stowage of cargo was fully completed in the forward end the day before the accident."

Again, there is no testimony to support this statement. It was stipulated that all of the cargo that was in the forward end of the lower hold of the starboard side of the No. 3 hatch at 10:00 A.M. on November 6th, had been loaded the day before by UMS. There is no testimony that this portion of the hatch was completed at that time. Even if it had been, there was no way for the shipowner to know that the stevedore was not going to load other cargo into the forward end. As testified to by Mr. McGann, the final stowage plan is made up by the stevedore. The stevedore gives it to the shipping company when "the loading is finished that evening and given to the vessel prior to sailing." (102A). As to when the stowage plan in this case was given to the ship by the stevedore, he stated, "We have in the lefthand corner here there is a

receipt that the stevedore gets signed by the mate that he has received same." (102A-103A). That receipt (132A) clearly shows that it was received on November 9, 1973, the evening of the last day of loading. Therefore, the plaintiff's statement that the stowage of cargo was fully completed in the forward end the day before the accident is not supported and there is no evidence that the vessel knew which portions of the hatch were completed prior to November 9th.

6. Paragraph 2, Sentence 4—"It is apparent that as the cargo was stowed in the square, the free standing ladder would have to be moved and no longer used."

Again, the plaintiff makes a completely baseless statement of fact. There is no evidence whatsoever to support this in the testimony elicited at the trial. Plaintiff's attorney full well knows the practice is that, if necessary, the wooden ladder is raised on cargo as it is being loaded to afford ingress and egress to the stevedores.

7. Separation paper—dunnage.

On page 7 of its "Discussion", plaintiff argues that dunnage should have been used and that there was no need to use separation paper in the stow in the forward end. Whether or not dunnage should have been used gives rise to no liability on defendant's part. It was the stevedore who was in control and the expert in loading cargo. Not only by operation of law but by specific provisions in the contract between the defendant and UMS, the duty to use dunnage when necessary was on the stevedore.

As to whether or not there was the need to use separation paper, plaintiff assumes that the only use of separation paper is to segregate cargo for different ports. Again, there is no evidence in the record to support this. The

plaintiff testified that the paper was "separating these reels from these cartons of general cargo." (59a). As previously set forth, it is the stevedore who loads cargo. Even if someone from the vessel had seen the separation paper, of which there is no evidence, it would be meaningless to the shipowner. Firstly, it is the stevedore who is to properly load the cargo and, secondly, one seeing separation paper who does not receive the final stowage plan from the stevedore until four days later has no knowledge of whether the stevedore is in fact going to place other cargo thereon destined for different ports.

After comparing the plaintiff's characterizations of the facts with those testified to at trial, it cannot be disputed that the factual basis upon which the legal determination must be made is as set forth by the defendant, i.e., Is there a duty on the shipowner to discover a latent defect in cargo stowed by the injured longshoreman's employer?

POINT II

Standard of Care

The plaintiff in Points II and III of its brief suggest random reasons for the affirmance of the judgment in this case. None, in defendant's opinion, are legally supportable.

A. The unknown shipowner may not be held vicariously liable for a latent condition in a stow created by plaintiff's employer.

This proposition has been uniformly recognized by the 1972 Amendment, its legislative history and the applicable case law. There have been no exceptions to this general rule and we submit that nothing in the case presently before this Court would justify not adhering to it.

Any condition on board the CIUDAD DE IBAGUE which caused plaintiff to be injured was one created by employees of UMS. This is not disputed. To place responsibility for this condition would be to hold Flota vicariously liable for the negligence of the expert independent contracting stevedore. The 1972 Act specifically ruled out that type of liability.

The legislative history clearly states:

> "The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore."
>
> "Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act. . . ." 3 U.S. Code Cong. and Admin. News 4702 (1972).

In *Teofilovich* v. *D'Amico*, 415 F.S. 732 (U.S.D.C., C.D. Cal. 1976), the Court stated at page 736,

> "By this Congress specifically excluded a rule of vicarious liability without fault and specifically excluded the concept of a non-delegable duty, . . ."

In *Henry* v. *United Overseas Marine Corp., supra,* the 3rd Circuit clearly held as a matter of law that there is no duty owing to a longshoreman by the vessel for the stowage operations of the stevedore employer. As therein stated, at page 48A,

> "My interpretation of *Lucas* is that it is possible for there to be independent causes of an accident which can join together, in which case there could be fault on the part of the vessel, in which case the vessel will be responsible and liable if it independently was at fault. *But I do not believe that it is a proper interpretation of Lucas to regard as concur-*

> *rent negligence the failure of the vessel owner to correct the negligent act on the part of the stevedore in the performance of his duties.* In that respect I differ with the *Marant* Court." (emphasis added)

The Third Circuit affirmed the District Court's opinion in *Henry* and reversed the *Marant* —— F. 2d —— (3 Cir. 1977) lower court's holding. (Both decisions appended hereto.)

The Court in *Frasca* v. *Prudential Grace,* 394 F.S. 1092 (D.C. Md. 1975) fully discussed this issue in an opinion setting aside a jury verdict for plaintiff, at page 1097.

> "Before the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, a longshoreman could recover against a shipowner for injuries suffered during the course of his employment on board ship under either or both of two distinct theories; the doctrines of seaworthiness and negligence. Under the former the shipowner's liability was in the nature of strict liability; he had an absolute, continuing duty to provide the longshoremen with a reasonably safe place to work. *See Provenza* v. *American Export Lines, Inc.,* 324 F. 2d 660, 662-3 (4 Cir. 1963); *Ramirez* v. *Toko Kaiun K.K.,* 385 F. Supp. 644, 648-49 (N.D. Cal. 1974). However, the 1972 Amendments have eliminated unseaworthiness as a remedy for longshoremen injured on a vessel; only the longshoreman's action in negligence has been retained."

And at page 1098,

> "Thus in this case, if the active negligence of the longshoreman or some third party had caused the greasy condition while the stevedore had exclusive control over No. 4 hatch, the owner could not be

> held liable for the plaintiff's resultant injury, at least absent notice of the condition to the ship's crew. (citations omitted) Under the pre-1972 doctrine of seaworthiness, however, the shipowner would have been liable, regardless of the cause of the condition, under its continuing non-delegable duty to provide a reasonably safe place for the longshoremen to work, which duty extended to dangerous conditions arising during the performance of the stevedoring work. (citation omitted) Under the new law, it is primarily the duty of the stevedoring company to correct such defects. (citations omitted) Thus, the 1972 amendments eliminate the absolute, non-delegable duty to provide a reasonably safe place to work."

The Court continued, at page 1099, that the duty

> "is not 'nondelegable' as that term has been traditionally used in admiralty law to describe the absolute duty imposed by the doctrine of seaworthiness under which the shipowner could be held liable even for dangerous conditions arising from the details of the contractor's work methods in the work area after the owner had relinquished exclusive control over such matters to the stevedoring company. On the contrary, land-based law imposes no such liability. This is true, because once the manner and area of work is turned over to the exclusive control of the independent contractor (stevedore), the shipowner, like the landowner, has no duty to supervise the details of the independent contractor's method of operation to see if any dangerous conditions have arisen therefrom." (citations omitted)

Finally, the Court, at page 1099, on the issue of constructive notice stressed,

> "It should again be emphasized that the shipowner cannot be charged with constructive knowledge for his negligent failure to inspect and discover dangerous conditions arising after exclusive control over the work has been relinquished to the stevedore company. *Slaughter* v. *Ronde, supra.*"

The case before this Court should be dismissed as was the *Frasca* case.

Plaintiff argues at page 14 citing *Napoli* v. *Hellenic Lines, Ltd.*, 536 F. 2d 505 (2 Cir. 1976) that it does not make any difference who created the condition. This is not so. *Napoli* itself points out that there was a question of fact in that case as to who created the condition.

B. Shipowner is not responsible to a longshoreman for a latent condition created by his employer by reason of the stevedores leaving the hatch overnight.

Plaintiff's argument that the shipowner has a duty to a longshoreman the day after a latent defect is created by the stevedore but not the day the work was done finds no support in case law or amending legislation. As set forth in the defendant's main brief, Point II, B, any duty owed the longshoreman for the work performed by his expert stevedore employer is owed to the longshoreman by the stevedore and not by the vessel. Responsibility for the creation of that latent defect by the stevedore does not render the shipowner vicariously liable by reason of the longshoremen's leaving the vessel for the hour lunch break, nor leaving the vessel at 9:00 P.M. in the evening and returning 8:00 A.M. the next day. Nor is a shipowner vicariously liable for the negligently stowed cargo by the expert stevedoring contractor by reason that one carton, one tier or one portion of a hatch level may be completed

by the stevedore. The shipowner is not an insurer of the work done by the expert stevedore, nor is it in any way liable to, nor owe any duty to an employee of that stevedoring expert, for a latent defect created by the method of loading cargo. The doctrine of unseaworthiness has been abolished. To permit a case such as this to be decided by a jury would be to reinstitute unseaworthiness.

That the responsibility and duty for the work done by an independent contractor is that of the stevedore was clearly the holding in *Brletich* v. *U. S. Steel Corp.* (285 Atl. 2d 133) (Sup. Ct. of Pa. 1971), which states "that when a landowner turns the work to an independent contractor with experience and know-how, who selects his own equipment and employees, the possessor of land has no further liability in connection with the work to be done."

Plaintiff makes the same argument as did the plaintiff in *Cutlip* v. *Lucky Stores, Inc.*, 325 A. 2d 432 (Ct. of App. of Md. 1974) that in some manner the responsibility for the work done by the stevedore becomes the responsibility of the shipowner vis-a-vis the longshoreman. As stated by that Court at page 438,

> "We do not consider that Le Vonas contemplated the work product of a contractor erector after he takes control of the premise as a dangerous condition of the premise from which the contractor's employees must be protected by the owner to his peril."

This, of course, is exactly what plaintiff urges this Court to hold, that a shipowner should be responsible to the plaintiff for the work done by his employer. Again, there is no authority whatsoever to support this contention, and it having been conceded that any condition existing which caused the plaintiff injury was the work done

by his employer, plaintiff's complaint must be dismissed as a matter of law.

Plaintiff's argument that the cases cited by defendant refer to operational negligence and not to conditions created and left overnight by the sub-contractor is incorrect. Plaintiff cites *Ramirez* v. *Toko Kaiun K.K.*, 285 Fed. Sup. 644 (N.D. Calif. 1975), and characterizes this as an improper method of discharging case. By reading the case, it is apparent that the plaintiff, in *Ramirez,* argued that upon boarding the vessel, the pipe which they were to have discharged should have been loaded in the other port preslung. They were complaining about the place of work, i.e., the method of stow, which was not created by their own employer, the day before but created by a different company many days before. Also, the condition described in *Ramirez* was known the first day that the stevedores came on board and the injury didn't take place until the following day.

Likewise, plaintiff's attempted distinction on the basis that crewmen were aboard the vessel is not justified. See e.g. *Slaughter, supra.*

The plaintiff does not cite one single case to support its theory nor does it demonstrate that any cases cited by the defendant so holds.

Frasca v. *Prudential Grace Lines, supra,* at page 1098, held,

> "However, some courts may have confused the elimination of this absolute duty with the owner's duty under land-based principles to exercise reasonable care to provide employees of independent contractors *initially* with a reasonably safe place to work."
>
> "• • • the duty is encompassed within the land-based owner's general duty to exercise reasonable

care to make the premises reasonably safe for the *entrance* of his invitees." (emphasis added)

Plaintiff's attempt to say that the work being done by UMS was something other than loading the No. 3 hatch, lower hold, i.e., the No. 3 hatch lower hold, forward square, is to make a distinction which does not exist.

C. The duty to supply means of ingress and egress to the lower hold was that of the stevedore.

The Longshoremen and Harbor Workers' Safety Regulations required that plaintiff's employer provide an accessible ladder for the plaintiff's gang. (§1918.24) The uncontradicted testimony is that there was an accessible ladder available, the ladder used by the plaintiff in descending from the lower tween deck to the lower hold.

The arguments of plaintiff describing the place of injury as a pathway to the forward escape hatch ladder which was a means of entrance to and exit from the starboard lower hold has no support in the testimony nor any relevancy to the issue before this Court.

The inference, without being explicitly stated, that there was a legal requirement that the forward escape hatch ladder be provided and maintained by anyone (let alone the vessel) as a means of leaving or entering the lower hold has no legal support.

POINT III

Section 413 of the Restatement of Torts, 2d

Plaintiff in Point III of its brief without citation of any authority whatsoever infers that §413 of the Restatement of Torts, 2d, pertains to the factual situation in our case.

Section 413 provides:

> "One who employs an independent contractor to do work which the employer should recognize is likely to create, during its progress a peculiar unreasonable risk of phyical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precaution if the employer (a) fails to provide in the contract that contractor shall take such precautions; or (b) fails to exercise reasonable care to provide in some manner for the taking of such precautions."

The plaintiff's claim is entirely unsupportable since, (1) §413 is not applicable to the post amendment longshoremen cases, as thoroughly discussed in the case of *Teofilovich* v. *D'Amico Mediterranean/Pacific Line, supra;* (2) the vessel owner's contract with the stevedore in this case does specifically provide that the stevedores shall use dunnage in loading cargo when necessary to make a secure stow; and (3) this case presents no peculiar risk. As stated in *Slaughter* v. *S. S. Ronde, infra,* at page 645,

> "The physical handling of an ordinary bale or bundle is the clearest example of a detail within the specific competence and peculiar responsibility of the stevedoring contract and that such is clearly . . . not the province or responsibility of the ship."

Furthermore, as pointed out in *Teofilovich, supra,* to hold this section applicable would be holding that the shipowner had a non-delegable duty to provide a safe place to work. In *Napoli* v. *Hellenic Lines, supra* and all other cases that have been decided by the Circuit Courts in interpreting the 1972 Amendments it has been uniformly

recognized that a non-delegable duty is no longer a standard in Longshoremen-Shipowner cases. Restatement §413 is not applicable to this case.

POINT IV

Charge to the Jury

Plaintiff's statement in Point III of his brief that the defendant on his appeal now claims that the case should not have been submitted to the jury and its further claim that the defendant did not take exception to the charge is misleading in the first instance and incorrect as to the second statement.

The defendant at the end of the plaintiff's evidence moved for a directed verdict on the basis that there was no evidence to support a verdict for the plaintiff. That motion was renewed at the end of the defendant's case and decision was reserved thereon until after the jury verdict. Having made such motion, of course, preserves that issue for appeal before the Appellate Court.

The defendant in addition thereto certainly did take exceptions to the charge of the trial Judge. We believe that exceptions taken and listed below were proper requests, should have been charged and the failure to so charge is reversible error in the event this Court does not agree with the defendant's main contention that there was no evidence to support the plaintiff's verdict.

The exceptions that were taken to the charge which we believe are reversible error are as follows:

1. Concurrent Joint Negligence.

The trial judge (113 a) instructed the jury that they should find the shipowner liable to the plaintiff if they

found that the shipowner's concurrent, joint negligence with the stevedore was a proximate cause of the accident. Defendant excepted to this charge (122 a) and further excepted "to the Court's not charging that primary responsibility to make sure that the longshoreman has a safe place to work is on the stevedore and not on the shipowner."

The Third Circuit in its decision just handed down in *Marant* v. *Farrell Lines, supra,* had this exact same question before them, and ruled that this was an erroneous charge as a matter of law and reversed the verdict for the plaintiff. As stated at page 4 of that opinion, the defendant had requested,

> "that the trial court should have charged, as Farrell requested, that the primary responsibility for longshoremen's safety was on the stevedore. A recent decision of this court not available to the District Court at the trial of this case, substantiates Farrell's position. Accordingly, on the basis of *Brown* v. *Rederi,* Fed. 2d—No. 76—1037 (3rd Cir., Nov. 4, 1976), we will order a new trial."

At that same page, the court continued.

> "As Judge Van Dusen has recently observed, speaking for this Court, 'express language in the statute and the legislative reports accompanying the 1972 Amendments amply demonstrate that for reasons of policy, the major responsibility for the proper and safe conduct of the work was to be borne by the stevedore.' Brown v. Rederi, SLIP OP. at 11."
>
> "This was an important aspect of the legislative plan, intended to focus responsibility for longshoremen's safety on those best able to improve it, the stevedores. To say that responsibility is concur-

rent or joint is plainly inconsistent with the intention of the Act to place primary responsibility on the stevedore."

2. Duty to Inspect.

We believe that the trial court committed reversible error in failing to charge as requested by the defendant (121 a) "that reasonable care does not require ship's officers to inspect each hold daily to be sure that the stevedore has properly performed the work which it was hired to perform and that they inspect so thoroughly that they discover a danger which is not readily apparent, and which is not appreciated by the longshore themselves."

This particular standard of care was a specific holding in the case of *Slaughter* v. *S.S. Ronde*, 390 Fed. Supp. 637 (S.D. Ga. 1974), aff'd 509 Fed. 2d 973 (5th Cir. 1974).

3. Ladders

We believe that the trial court committed reversible error in failing to charge as requested by the defendant (121 a) that with regard to ladders, the duty on the stevedores is to make certain that there is one ladder accessible in the hatch, that the uncontradicted testimony was that there was such a ladder in the hatch and therefore there was no duty on the shipowner to inspect any pathway to an escape hatch ladder." See *Marant* v. *Farrell Lines, supra* and Point II C.

4. Supervision

We believe reversible error was committed in not charging as requested by the defendant (122 a) that the shipowner does not have a duty to supervise the loading and/or discharging of the stevedore. Numerous cases to this effect have been cited elsewhere in this brief and in the main brief of the defendant and we will not repeat them here.

5. Injury Caused by Work of Sub-Contractor.

We believe that the trial court committed reversible error in not charging as requested by the defendant (122 a-123 a) that if the plaintiff's accident was caused by an unsafe method or manner of loading by the stevedore, you must find without more for the defendant shipowner. Again, numerous citations and discussions have been had of this point elsewhere in this brief and the defendant's main brief.

It is the shipowner's main argument that there is no evidence in this record to support any liability on the defendant for plaintiff's injury. However, if the Court does not agree with that proposition then it is the defendant's position that each of the above exceptions taken to the charge are correct propositions of law, should have been charged, and the failure of the trial Judge to charge them was reversible error.

CONCLUSION

The verdict of the District Court should be reversed and judgment entered for defendant.

Respectfully submitted,

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ADDENDUM A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

- - -

No. 76-1618

- - -

Helen Henry
ROBERT HENRY

v.

UNITED OVERSEAS MARINE CORPORATION

ROBERT HENRY, Appellant

- - -

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D. C. Civil No. 73-1613)

- - -

Argued January 6, 1977
Before: ALDISERT and WEIS, Circuit Judges, and KNOX, District Judge. *

- - -

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court oral opinion by The Honorable Alfred L. Luongo on March 12, 1976 [1.] (as set forth at pages 42a-53a of the joint appendix), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

Attest:

Thomas F. Quinn, Clerk

DATED: JAN 6 1977

Circuit Judge

* Honorable William W. Knox, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

1. See also Brown v. Rederi, ___F.2d ___(No. 76-1037)(3d Cir. Nov. 4, 1976).

DELETED

THE COURT: I can understand that counsel have made a very conscious effort to try to devise a procedure which will guarantee appellate review of a fact situation so that we can begin to fill in the outlines of the obligation of the vessel owner under the 1972 amendment to the Longshoremen and

Harborworkers' Act.

Under normal circumstances I believe I would have accommodated counsel and filed a written, and perhaps lengthy, and hopefully scholarly opinion, setting forth my reasons for what I am about to do. But I think that the factual situation in this case, as defined and limited by the stipulation of facts filed by counsel, renders this case of relatively minor significance in the overall pattern of the cases which will ultimately define the outlines of the shipowners' obligations as they relate to cargo operations.

I will start at the end, or perhaps we will call it the beginning because if indeed a jury were here in the jury box, the beginning and the end would be the same. I grant the defendant's motion for directed verdict. That would be all I would say if a jury were in the box and leave it to counsel to do something at a later stage. But I think that the circumstances here require some exposition, albeit brief, of my views, and the considerations that have caused me to direct the verdict in favor of the defendant.

Northern Metals Company, the stevedore, and plaintiff's employer, is clearly, by any definition,

an independent contractor hired to discharge cargo. Indeed in this case Northern Metal was not even hired by the vessel owner. It was hired by the time charterer of the vessel. I make no great issue of that. That is not the important element here.

What is important is that there is no evidence in this stipulation which has been submitted to the Court that the vessel owner, or the charter party retained any right to control the method and manner of doing the work. I have no idea whether under other factual circumstances, or other types of evidence that might be presented, custom of the trade, or otherwise, there might be some evidence of the degree of control retained by a vessel owner of the precise manner and method of doing the work for which the stevedore, presumably an expert, was engaged to perform.

The only evidence in this stipulation, that which relates to the checking of the cargo holds by the chief mate and the third mate where work was being performed, is consistent with the vessel owner's checking of the progress and results of the work, much as the role performed by the safety inspectors in Fisher versus United States, one of the cases relied upon by defendant, 441 Fed 2d 1288, Third

Circuit (1971).

In plaintiff's brief -- not so much in the oral argument here today, but in the brief -- plaintiff has argued that there is a fact question as to whether the shipowner reasonably should or should not have expected the stevedore to change the method of discharge. And the stipulation does provide that there is no evidence that any request, or suggestion, or even an order to change the method of work was made.

On the other hand, as defendant has pointed out, there is no evidence that had such a request or suggestion, or order been issued, that it would have had any effect. And this, again, goes back to the earlier statement that I made, that there is nothing in the evidence before me to indicate that the shipowner retained any right to control the method and manner of performing the work.

I can envision situations in which the method used by the independent contractor creates such a high degree of risk and danger to persons, and property, as to justify the extreme measure of cutting off the power to the winches. But this is not such a case. I can envision a case, for example, where the independent contractor's personnel has

come aboard and it becomes obvious in short order that they have broken into the bonded cargo and have drunk themselves into a state of intoxication, and in some fashion show a complete lack of control and a degree of conduct, or lack of control as to create a serious danger that would require a vessel owner to take the extreme measure and put a halt to the operations.

I do not accept the argument made by plaintiff's counsel that the control over the power source is the kind of control that makes the shipowner liable for the acts of the independent contractor. I shudder to think that if I, as a home owner, hired an independent contractor, and that independent contractor makes use of my source of electricity, my source of water, and that that will be interpreted, the fact that he does make use of them, would be interpreted as a measure of control on my part over the method and manner in which he performs his work, is unthinkable. And I reject the fact that the vessel owner has control over the power source to the winches as a basis for concluding that the vessel owner has the right to control the manner and method of the work performed by the stevedore.

In my view, Congress intended to relieve

the vessel owner of liability for the negligent performance by the stevedore of the work which the stevedore was hired to do. Congress did intend to make the vessel owner liable for its own independent acts of negligence, not for the vessel owner's failure to correct the stevedore in what the vessel owner regarded as an improper method of doing work the stevedore was hired to perform.

There are many acts of negligence for which a vessel owner may be liable, as for example oil on the deck placed there by the carelessness of ship's personnel, or oil on the deck pre-existing the arrival of the stevedores. And, incidentally, the oil on the deck I believe was an illustration used in the legislative history of the 1972 amendment; or a loose step about which the stevedore might not become aware when the stevedore comes aboard to do the work. I agree that there is liability and should be liability, and I believe Congress intended that there be liability for such independent acts of negligence on the part of the vessel.

Counsel for the plaintiff has submitted the opinion in Marant versus Farrell Lines, Inc., Civil Action 73-2615 in this Court, as reflecting the view that in the Lucas case, the three-judge panel of

this Court, of which I happened to be a member, intended that there be concurrent negligence on the part of the vessel owner and the stevedore. My interpretation of the Lucas language differs from the Judge who wrote the opinion in Marant.

In my view, Lucas simply intended to refute the argument by the counsel for the vessel owners in Lucas, that Congress intended there to be liability only if the negligence of the vessel was the sole cause of the accident. My interpretation of Lucas is that it is possible for there to be independent causes of an accident which can join together, in which case there could be fault on the part of the stevedore and there could be fault on the part of the vessel, in which case the vessel will be responsible and liable if it independently was at fault. But I do not believe that it is a proper interpretation of Lucas to regard as concurrent negligence the failure of the vessel owner to correct the negligent act on the part of the stevedore in the performance of his duties. In that respect I differ with the Marant court.

I add a word, simply as further reason for my conclusion. To adopt the interpretation advanced by plaintiff in this case, would be to create chaos

in stevedoring operations.

If the vessel owner were placed in the situation of having to correct an improper method of operation, imagine what would happen in the course of operations: The chief mate observes a certain method and he then gets into a dispute with the gang boss, and thereafter the superintendent and the ship boss over what is or what is not the proper method of operation. They may disagree as to whether the operation being performed by the stevedore is a proper or an improper one. I recognize that that is not the fact here. It is stipulated that everyone was aware that this was not a reasonably safe method. But I am simply speaking now to what Congress contemplated by this.

Query: Would this call then for a stoppage of work while they then call for an arbitrator to decide who is right as to what is the proper method of operation? Certainly the facts of life in the commercial world would not accept that as a viable alternative to placing the control of the method of operation on the person who was engaged to perform that kind of work with the limited reservation that I expressed earlier, when the conduct of the stevedore reaches a certain stage, then any reasonable person

would have to, even at the extreme expense of the cost of shutting down operations, have to shut down operations. As I said, I do not thing that this is such a situation.

There were several other thoughts that occurred to me, but I cannot think of them at this moment.

One of the things that I did want to express, I am aware of the various standards that have been espoused in a number of the cases. This case does not call upon me to say what standard should be applicable ultimately. On this fact situation I am simply noting that I could not submit to a jury and have them speculate on these issues of control.

I am not at all certain that those cases which have equated the vessel owner's responsibility under the 1972 amendment to a land based landowner's obligation to the workmen of an independent contractor will ultimately be the test applicable in this Federal common law relating to vessel owner and longshoremen. My own personal view is that in the course of time there will develop a Federal common law which will be peculiar to the relationship between vessel owner, stevedore and longshoremen. It will be as Congress mandated, a uniform Federal law. It will not be

bound to any particular state law or state theory, but I think what will ultimagely emerge at the very least is that the vessel owner will hot bear the responsibility for failing to tell the stevedore how properly to perform his duty.

(Off the record discussion).

THE COURT: Interestingly, one of my colleagues on the three-judge panel on the Lucas case, Judge Huyett -- indeed he was the author of the Lucas opinion -- in the case of Shields, et al. versus A. P. Moller, Civil Action No. 74-1032, in a nonjury trial on January 23, 1975, ruled that there was no liability on the part of the vessel owner for bringing aboard a gas forklift truck into a hold in which there were no ventilators where ship's personnel on the main deck apparently were present when the forklift truck was taken aboard.

I was looking through the transcript here to see if I could find any specific comment. I can only say that one of Judge Huyett's conclusions of law, as reflected in the transcript, is that there is no retention of control by the shipowner of the work performed by the stevedore company. Next, since there was no retention of control by the defendant shipowner, there was no duty on the part of the

defendant to protect the plaintiff against the equipment of their own employer, which equipment had been brought on the ship by the plaintiff's own employer, and found that there was no negligence on the part of the vessel owner under those facts.

He added this comment: "May I say that I believe that it would undermine and be completely contrary to the congressional purpose of the 1972 amendments to hold a shipowner liable where the stevedore company had complete control of the work being done and where the stevedore company had brought the gas forklift truck on board, which was the equipment involved in this case, and directed its operation, and of course where the ship had no notice or knowledge of the allegedly dangerous condition." I note that that last statement of Judge Huyette's, of course, is a complete distinction from the facts before me where it is stipulated that the shipowner does have knowledge. But I thought it would be interesting, in any event, to get the reaction of the author of the Lucas opinion to his theory of liability.

I have not undertaken to list the various cases by name. Counsel have set them forth in their briefs: The Hite case, the Frasca case, and all of the rest of them, including the one cited by Mr.

Shuster. But, as I say, I don't think that this is an appropriate case to go into an extended exposition as to what the ultimate standard will be. I conclude only that the shipowner has no liability for failure to correct the kind of improper work that was taking place on this vessel on the day in question.

DELETED

ADDENDUM B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-1383

MILTON MARANT

v.

FARRELL LINES, INC.,

Appellant.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 73-2615)

Argued November 16, 1976
Before: VAN DUSEN, BIGGS and ALDISERT, Circuit Judges.

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OPINION OF THE COURT

(Filed JAN 31, 1977)

ALDISERT, Circuit Judge.

The central dispositive issue on this appeal is the question of the relative responsibility of stevedore and shipowner for longshoreman safety under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 et seq. Marant, a longshoreman injured in unloading a cargo, brought this negligence action against Farrell Lines, the shipowner. The trial court charged the jury that stevedore and shipowner had concurrent responsibility for longshoring safety and the jury, by special verdict, found the stevedore and shipowner equally at fault in causing the injury. Damages were stipulated and judgment for the full amount was entered against Farrell. Farrell appealed. We reverse.

I.

Marant was employed as a longshoreman by the Lavino Shipping Company, an independent stevedoring contractor hired by Farrell Lines to discharge a cocoa bean cargo from its vessel, the S.S. African Moon, in Philadelphia. The beans had been loaded in Africa by African longshoremen under the supervision of the vessel's officers and, although the testimony was disputed, witnesses for the plaintiff testified that the cargo had been improperly stowed "bag on bag" (each layer of bags running in the same direction as the layer beneath it) instead of in the safer "lock stow" (each layer of bags running perpendicular to the layer beneath it). Marant was injured when a tier of bags collapsed and hit him. A witness testified that the collapsing tier was about 15 feet high, that it stood behind another tier 12 feet high, and that Marant was standing 6 or 7 feet from the tier that fell on him. The central issue at trial was the method adopted in stowing the bags.

The jury returned a liability verdict against Farrell. By special interrogatories it determined that Marant was not contributorily negligent, that Lavino and Farrell were both

negligent, and that each had contributed 50 percent to the happening of the accident. Damages were stipulated as $20,000 and the district court entered judgment in favor of Marant and against Farrell in that amount. Farrell's motion for judgment notwithstanding the verdict or for a new trial was denied.

Farrell raises the following points on appeal:

(1) Under the 1972 Amendments to the LHWCA, the stevedore has the primary responsibility for longshoremen's safety and the vessel's duty is only to disclose latent defects of which it has knowledge. Under this law and the factual circumstances, the district court erroneously failed to direct a verdict for Farrell. In addition, it incorrectly charged the jury as to Farrell's duty under the law and compounded that error by repeating the original confusing charge verbatim when asked by the jury for clarification of the relative duties of vessel and stevedore.

(2) Under the 1972 Amendments to the LHWCA, a vessel cannot be held liable where the stevedore contributed to a longshoreman's injury.

(3) The jury verdict was clearly against the weight of the evidence.

(4) Where the jury found that Farrell's negligence contributed 50 percent to the happening of the accident, Farrell should be assessed only 50 percent, or $10,000, of the stipulated damages of $20,000.

II.

As a preliminary matter, we will deny Farrell's request for a directed verdict in its favor. We cannot say, as a matter of law, that the record is "critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." Denneny v. Siegel, 407 F.2d 433, 439 (3d Cir. 1969).

Farrell has challenged specifically that portion of the trial court's charge which informed the jury that "[t]he responsibility for the safety of the longshoreman lies concurrently or jointly with the longshoreman's employer, and with the shipowner." (546a-547a) Farrell asserts that this is an inaccurate statement of the relative responsibilities imposed by the 1972 Amendments to the LHWCA and that the trial court should have charged, as Farrell requested (405a), that the primary responsibility for longshoremen's safety was on the stevedore. A recent decision of this court, not available to the district court at the trial of this case, substantiates Farrell's position. Accordingly, on the basis of Brown v. Rederi, ____F.2d ____, No. 76-1037 (3d Cir., Nov. 4, 1976), we will order a new trial.

As Judge Van Dusen has recently observed, speaking for this court, "express language in the statute and the legislative reports accompanying the 1972 Amendments amply demonstrate that for reasons of policy the major responsibility for the proper and safe conduct of the work was to be borne by the stevedore." Brown v. Rederi, slip op. at 11. This was an important aspect of the legislative plan, intended to focus responsibility for longshoremen's safety on those best able to improve it, the stevedores. To say that responsibility is concurrent or joint is plainly inconsistent with the intention of the Act to place primary responsibility on the stevedore.

The principle of concurrent or joint responsibility was stated as the first substantive legal precept in the charge. It was reiterated later when the court told the jury that it was their job to decide if the stevedore was "solely or concurrently" responsible (548a), and it was, at least by implication, reinforced when the court charged that "[t]he duty to provide a reasonably safe place to work can rest upon more than one party, and it

includes the owner of the vessel." (549a) After being sent out to deliberate, the jury returned to ask the court, inter alia: "Is it the ship's responsibility to provide a safe and reasonable place for the men to work in the hold as per your charge?" (569a-570a) The court answered by repeating verbatim the portion of its charge beginning:

> You have for your determination the claim that the owner of the vessel or its agents were negligent toward plaintiff, a longshoreman. The shipowner, for its part, denied plaintiff's allegation of negligence.
>
> The responsibility for the safety of a longshoreman lies concurrently or jointly with the longshoreman's employer and with the shipowner.

(570a) We have no way of knowing, of course, but it seems not unlikely that the equal responsibility portion of the jury instructions played a part, at least, in the jury's decision that the vessel and the stevedore were equally at fault in causing the accident.

The question of relative legal responsibility went to the very essence of the case; the jury's question amply evidences their awareness of its importance. Particularly under these circumstances, we believe that Farrell is entitled to a new trial. Upon remand, the district court will now have the advantage of our analysis of the 1972 Amendments in Brown, supra, and also in Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (3d Cir. 1975), cert. denied, 96 Sup. Ct. 785 (1976); and we will direct consideration of these precedents insofar as they are relevant to issues that may be raised.[1]

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1. In Brown, we emphasized the relevance of § 941(a) of the Act:

> Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this chapter and shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment and to prevent injury to his employees.

33 U.S.C. § 941(a) (1970).

We also indicated the possible importance of non-compliance with the applicable OSHA Safety and Health Regulations. The

(FOOTNOTE CONTINUED)

As a new trial will be required in any event, it is not necessary for us to meet appellant's additional points. We will take this opportunity, however, to express our concern about the question of apportionment of damages in cases where it is found that stevedore and vessel have been concurrently at fault. We recognize that the apportionment question is fraught with difficulty, that it involves largely intractable conflicting interests, and that it implicates in contradictory ways three ordinarily separate fields of law, to-wit, the common law of torts, statutory workmen's compensation law, and the law maritime. But, as we view it, there are really only three alternatives.

First, the vessel could be made to pay the whole of the damages without reduction for the stevedore's fault and without contribution from the stevedore. Second, the vessel, after paying the whole of the damages, might be held entitled to a true "contribution" from the stevedore, either in a fixed percentage or according to relative fault. Third, the vessel might be held entitled to a reduction of liability or a "credit" because of the stevedore's concurring fault, again, either in a fixed percentage or according to relative fault. This last concept of a credit to the vessel is a relative newcomer on the legal scene. It has been espoused by some of the commentators,[2] and embraced by

FOOTNOTE 1 continued

responsibility for compliance with the regulations is on employers. "It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers . . . ." 29 C.F.R. § 1918.2. The OSHA regulation relating to stowed cargo would seem to be of special relevance to the case at bar:

> 29 C.F.R. § 1918.83 Stowed cargo, tiering and breaking down.
>
> (a) When necessary, cargo shall be secured or blocked to prevent its shifting or falling.
>
> (b) In breaking down, precautions shall be taken, when necessary, to prevent the remaining cargo from falling.

2. The idea of a proportionate or "equitable" credit is proposed in Cohen and Dougherty, The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation, 19 N.Y.L.F. 587 (1974). It is further discussed and advocated in Coleman and Daly, Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 35 MD. L. REV. 351 (1976).

several federal trial courts,[3] but, to date, has not found wide acceptance in appellate jurisprudence.

A fixed 50 percent reduction of recovery was allowed by the Court of Appeals for the District of Columbia Circuit in a case implicating the Federal Employees' Compensation Act, Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968), and has come to be known as a "Murray Credit". Judge Leventhal, writing for a panel of himself, Judge McGowan, and now-Chief Justice Burger, explained the result thus:

> A tortfeasor jointly responsible with an employer is not compelled to pay the total common law damages. The common law recovery of the injured employee is thus reduced in consequence of the employee's compensation act, but the act gave him assurance of compensation even in the absence of fault.

Ibid. at 1366. The Murray Credit was subsequently extended to a case arising under the pre-1972 LHWCA, Dawson v. Contractors Transport Corp. 467 F.2d 727, 729-30 (D.C. Cir. 1972), Judge McGowan further elaborating the result as follows:

> Since employers covered by workmen's compensation statutes are not liable in tort to their injured employees, other tortfeasors are not entitled to contribution from negligent employers, and thus, before Murray, bore the entire burden of the tort damages.
>
> To mitigate the harshness of this result, we held in Murray that a person against whom the employee was awarded damages in a tort action could reduce the judgment

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3. Croshaw v. Koninklijke Nedlloyd, B. V. Rijswijk, 398 F. Supp. 1224 (D. Ore. 1975) (accepting credit in theory but declining to apply it because of contrary precedent in the district); Frasca v. Prudential-Grace Lines, Inc., 394 F. Supp. 1092 (D. Md. 1975); Shellman v. United States Lines, Inc., 175 A.M.C. 362 (C.D. Cal. 1974), rev'd, 528 F.2d 675 (9th Cir. 1975); contra, Santino v. Liberian Distance Transports, Inc., 405 F. Supp. 34 (W.D. Wash. 1975); Hubbard v. Great Pacific Shipping Co., 404 F. Supp. 1242 (D. Ore. 1975); Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., 379 F. Supp. 759 (E.D. Pa. 1974) (specially convened three-judge panel).

by 50 per cent if he could show that the employer's negligence contributed to the injury.[3]

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3. Murray was itself an extension of this court's rule in Martello v. Hawley, 112 U.S.App.D.C. 129, 300 F.2d 721 (1962), where we held that when a plaintiff settled his claim against one tortfeasor, another tortfeasor against whom the plaintiff actually brought suit was entitled to reduce a resulting judgment by 50%.

Although Murray involved the Federal Employees' Compensation Act, 5 U.S.C. § 8101 et seq. (1970), its rationale applies equally to the virtually identical provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (1970) . . . .

While Dawson did apply the credit concept to the LHWCA, the 1972 amendments were not implicated in the case and, accordingly, the question may be considered open whether the District of Columbia Circuit will continue to adhere to Dawson in cases arising under the 1972 amendments.

The idea of a reduction of recovery proportioned according to fault--an "Equitable Credit"--has been rejected by the only Court of Appeals that has directly considered it, the Ninth Circuit. In Dodge v. Mitsui Shintaku Ginko, 528 F.2d 669, 672 (9th Cir. 1975), cert. denied, 96 Sup. Ct. 1685 (1976), Senior Judge Brown rejected "both the Murray and Shellman [Equitable Credit] Doctrines because they are contrary to the greater weight of authority, and also because they impose unjustified burdens upon the injured longshoreman." Judge Brown reaffirmed this result, on identical grounds and for the same panel, in a companion case, Shellman v. United States Lines, 528 F.2d 675 (9th Cir. 1975), cert. denied, 96 Sup. Ct. 1668 (1976).

The Second Circuit, in Landon v. Lief Hoegh & Co., 521 F.2d 756 (2d Cir. 1975), cert. denied, 423 U.S. 1053 (1976), held that the stevedore was not a necessary or indispensable

party in an action by the longshoreman against the vessel, but did not adjudicate the specific question of a credit. Similarly, the Supreme Court precedent most often cited on the question, Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1951), denied contribution from the stevedore-employer to the vessel but did not directly present for adjudication the possibility of a credit. And it is well established that "[a] decision is not authority as to any questions of law which were not raised or presented to the court, and were not considered and decided by it, even though they were logically present in the case and might have been argued, and even though such questions, if considered by the court, would have caused a different judgment to be given." H. BLACK, LAW OF JUDICIAL PRECEDENTS 37 (1912). See Kramer v. Scientific Control Corp., 534 F.2d 1085, 1090 (3d Cir.), cert. denied, 45 U.S.L.W. 3226 (Oct. 5, 1976).

Though our research has not been exhaustive, we do not perceive a "greater weight" of authority on the issue of a credit. On the contrary, our observation would be that, of the two courts of appeals that have considered the general credit concept under the LHWCA, one has accepted it, albeit prior to the 1972 amendments, and one has rejected it. We have found no Supreme Court precedent directly dispositive of the issue, and the district courts are in disarray. Under these circumstances, and particularly in view of the Supreme Court's activist attitude in maritime matters, see United States v. Reliable Transfer Co., 421 U.S. 397 (1975), we believe that the question of a possible credit to the vessel in cases of concurrent stevedore-vessel negligence is, at least in this circuit, very much an open question.

The concurring opinion expresses concern that any credit or apportionment rule would lead to increased litigation and that, even "if" the present rule is unfair, change should come from Congress. This court being already inundated with LHWCA litigation to interpret the 1972 amendments, it is difficult--though concededly frightening--to imagine an increase. It would seem as likely, however, that a rule which equitably apportioned liability

according to fault might decrease litigation and promote settlement, especially by removing the incentive of a large judgment against a shipowner who is only partly at fault. As the Supreme Court has recently observed: "Experience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements." United States v. Reliable Transfer Co., supra, 421 U.S. at 408. Concerning the propriety of judicial as against legislative action in this field, we will resist today the temptation to continue the venerable debate. Suffice it to say, in Judge Walter Schaefer's eloquent words, that "most depends upon the judge's unspoken notion as to the function of his court. If he views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not. If he views the court as an instrument of society designed to reflect in its decisions the morality of the community, he will be more likely to look precedent in the teeth and to measure it against the ideals and the aspirations of his time." W. Schaefer, Precedent and Policy, 34 U. CHI. L.REV. 3 (1966) (quoted in R. ALDISERT, THE JUDICIAL PROCESS at 802, 814 (1976)). Although we have indicated some of our concerns on the difficult issue of apportionment, we emphasize, again, that we expressly do not decide the issue at this time.

The judgment of the district court will be reversed and the cause remanded for further proceedings in accordance with the foregoing.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

MILTON MARANT v. FARRELL LINES, INC., Appellant, No. 76-1383

VAN DUSEN, Circuit Judge, concurring:

I join in parts I and II of the majority opinion. Also, I agree with the conclusion of part III that the issues of apportionment of damages between the stevedore and the ship, where they are both at fault, should not be reached on this appeal. I cannot agree with the extensive dicta in part III, which I believe should be omitted until there is an appropriate record requiring decision of the issues discussed there. However, in view of part III of the majority opinion, I feel it is desirable to set forth a number of other factors which are relevant to the issues in part III and should be considered by any trial court which is required to directly face these issues in the future.

A judicial apportionment of damages doctrine in cases brought against the vessel under 33 U. S. C. § 905(b) may be inconsistent with the intent of Congress[1] in enacting P. L. 92-576 (Oct. 27, 1972) for these reasons:

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1. It is clear that Congress gave careful thought to the statutory scheme of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) and the changes in that scheme brought about by the enactment of P. L. 92-576 in 1972. Both Houses of Congress held extensive hearings on proposed bills incorporating different changes, see Hearings on S. 2318, S. 52[illegible], S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. (1972), Hearings on H. R. 247, H. R. 3505, H. R. 12006, H. R. 1502 Before the Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess. (1972), and both Houses wrote extensive committee reports to explain the purpose underlying P. L. 92-576, see S. Rep. No. 1125, 92d Cong., 2d Sess. (1972), H. Rep. No. 1441, 92d Cong., 2d Sess. (1972). See also Comment, Negligence Standards Under The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Examining the Viewpoints, 21 Vill. L. Rev. 244 (1975-1976).

1. A judicial doctrine of apportionment of damages in 905(b) cases would result in the increased litigation that Congress sought to avoid by the 1972 Amendments, which inserted this wording in 33 U. S. C. § 905(b):

> "(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . . The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except [the right of the employer of the longshoreman to recover compensation paid from a vessel found negligent under § 905(b). See 33 U. S. C. § 933(b).]"
> (Emphasis supplied.)

These Amendments inserted this language in 33 U. S. C. § 905(a):

> "§905. Exclusiveness of liability
>
> "(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . ."

The Senate Report on P. L. 92-576 at 4-5, 9 and 11 uses this language:

> "The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.
>
> "For a number of years representatives of the employees have attempted to have the benefit levels under the Act raised so that injured workers would be properly protected by the Act. At the same time, employer groups indicated their willingness to increase such payments but indicated they could do so only if the Longshoremen's and Harbor Workers'

Compensation Act were to again become the exclusive remedy against the stevedore as had been intended since its passage in 1927 until modified by various Supreme Court decisions.

. . .

"The Committee heard testimony that the number of third-party actions brought under the Sieracki and Ryan line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases. The Committee also heard testimony that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committees attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party claims involving injured longshoremen on the backlog of personal injury cases in that court.[2]

. . .

"Since the vessel's liability is to be based on its

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2. This apparently refers to the case of Turner v. Transportacion Maritima, 44 F. R. D. 412 (E. D. Pa. 1968), which described the court congestion in this Circuit caused by the decisions of Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946), and Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U. S. 124 (1956). It may well be that a judicial apportionment of damages doctrine will increase litigation and may possibly have a similar impact in not only the district courts but this court as well. If such litigation does result, this will undermine the congressional purpose to free the courts from the burden of these longshoremen cases by enacting P. L. 92-576. The Chief Justice of the United States has pointed out that the impact of legislation and court decisions should be carefully considered by courts prescribing such legal rules. See, e. g., The State of the Judiciary--1975, by Chief Justice Burger, 61 A. B. A. J. 439 (1975).

> own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.
>
> "Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries.
>
> "Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.
>
> "Under the proposed amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages."

Part III does not meet the problems raised by the authorities cited, since it appears that a likely result of the "equitable credit" doctrine or any similar apportionment of liability would be to, once again, drag the stevedore back into the litigation process (thus undermining the safety)[3] in order

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3. It is clear that a major congressional concern in enacting P. L. 92-576 was that maritime safety be enhanced. The Senate Report contains this language:

> "It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.
>
> "This consideration is particularly crucial with respect to high-risk occupations such as those covered by this Act. Longshoring, for example, has an injury frequency rate which is well over four

to defend the subrogation lien he has on the longshoreman's recovery against the vessel.[4] See Pope & Talbot v. Hawn, 346 U. S. 406, 411-12 (1953); Third Circuit cases cited in footnote 6 of Brown v. Rederi, Opinion of November 4, 1976 (3d Cir., No. 76-1037); 33 U. S. C. § 933, as amended.

2. In any event, the cases of Murray v. United States, 405 F. 2d 1361 (D. C. Cir. 1968),[5] and Dawson v. Contractors Transport Corp., 467 F. 2d 727 (D. C. Cir. 1972),[6]

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3. (continued)

> times the average for manufacturing operations. It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry, and such means clearly include vigorous enforcement of the Maritime Safety Amendments of 1958 and the Occupational Safety and Health Act of 1970, as well as a workmen's compensation system which maximizes industry's motivation to bring about such an improvement."

Senate Report No. 92-1125, 92d Cong., 2d Sess., 2 (1972).

4. It is clear that a judicial doctrine of apportionment of damages in these suits will make the stevedore an indispensable party to the action. If the stevedore is not a party, then any finding assessing his proportionate fault will not be res judicata against him in a later suit asserting those rights afforded to him by 33 U. S. C. § 933, as amended by P. L. 92-576. See, e. g., Restatement of Judgments § 6 (1942). See paragraph 2 below.

5. It is apparent from the Murray opinion that two important theoretical considerations in the court's mind in reaching the result were (1) the doctrine of sovereign immunity since the United States was the compensation employer, and (2) the "indemnification doctrine" of Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U. S. 124 (1956). The sovereign immunity doctrine has no place in this case and the Ryan doctrine was explicitly abrogated by the Congress in enacting P. L. 92-576. See page 3 above.

6. In view of Judge McGowan's first sentence in Dawson and the fact that the district court did not allow a "Murray credit" set-off in the case, I have considerable doubt about the precise meaning of that case and consequently its applicability to longshoremen's third-party suits brought under § 905(b), as amended by P. L. 92-576.

were decided before 1972 when the Congress amended 33 U. S. C. §§ 905 and 933, as the majority points out in part III of its opinion. For this reason, these cases have a doubtful value as precedent for creating a judicial doctrine of apportionment of damages in § 905(b) cases. Also, there are other substantial reservations concerning the applicability of Dawson and Murray in the maritime section 905(b) actions where an injured longshoreman sues the vessel, since both Dawson and Murray involved exclusively land-based employees engaged in exclusively land-based occupations when injured.[7] Secondly, the Murray opinion does not deal with the so-called "lien" right which the employer and compensation insurer (by way of subrogation) have under 33 U. S. C. § 933,[8] as amended by P. L. 92-576. In Dawson, Judge McGowan indicated his concern that the problems raised by § 933 had not been considered in the court's earlier opinion in Murray, using this language in note 3 at page 730:

> "The District Court was concerned primarily with the apparent inability of an employer, if Murray is applied, to obtain reimbursement for payments made under the compensation statute. [Citing cases.]
>
> "The employer's right to reimbursement from his employee is not an issue in this case. Moreover, the question of Murray's validity was not argued to this panel, which, in any event, is without authority to overrule prior decisions of this

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7. This factor formed the basis for Judge Huyett's rejection of the "Murray credit" in Lucas v. "Brinknes" Schiffahrts Ges., 379 F. Supp. 759, 764 (E. D. Pa. 1975), appeal dismissed, No. 75-1223 (3d Cir., Apr. 30, 1975), cert. denied, 423 U. S. 866 (1975), a case cited by this court in Brown, supra at 9 note 6.

8. See Brown, supra at 9 note 6; 1A Benedict on Admiralty § 28 (7th ed. rev., 1973 release).

court. Consequently, we assume the continuing validity of the Murray rule and its application to cases involving the Longshoremen's and Harbor Workers' Compensation Act."

3. Two of the leading admiralty jurisdictions have written decisions which indicate that those Circuits will not follow an "equitable credit" doctrine or any similar apportionment of liability in § 905(b) cases under the 1972 Amendments. See Dodge v. Mitsui Shintaku Corp.,[9] 528 F. 2d 669, 672 (9th Cir. 1975); Landon v. Lief Hoegh, 521 F. 2d 756, 760, 763 (2d Cir. 1975). It would seem that resolution of the "contribution" issue was a necessary step in Landon and since this Circuit shares admiralty jurisdiction with the Second Circuit over the country's major port complex, the New York-Newark-Elizabeth area, the Landon case especially, and also the Dodge case, ought to be considered carefully before this court accepts the "equitable credit" doctrine or any similar theory of apportionment of liability in § 905(b) cases. To enact a judicial apportionment of damages in this Circuit in view of these other cases may undermine the essential uniformity which the Congress intended the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act to have. See Brown, supra at pp. 14-15 of slip opinion; see also G. Gilmore & C. Black, The Law of Admiralty, at 48 (2d ed. 1975) (hereinafter cited as Gilmore & Black).

4. In Brown, supra, we pointed out that the

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9. Most of the cases cited in note 3, page 7, of the majority opinion as supporting an apportionment of damages theory are from the Ninth Circuit and were decided before Dodge.

trial court's instruction erroneously imposed the stevedore's negligence upon the vessel. Apparently Congress intended that the doctrine of vicarious liability would not apply in § 905(b) actions. Similarly, the application / of an "equitable credit" doctrine or other judicial apportionment of damages means that the longshoreman, in effect, will be vicariously liable for the negligence of his stevedore-employer to the extent that the amount of the reduction ($10,000. in this case) exceeds the compensation paid by the employer.[10] Such a result has been condemned by Dean Prosser. See W. Prosser, The Law of Torts, § 74 (4th ed. 1971). The unfairness of this result has increased and confused the litigation in the common law courts when they have engrafted

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10. Professor Arthur Larson, a leading authority in the field of workmen's compensation law, offers the following analysis of Murray:

> "Assume the total damages are $20,000, . . . if the plaintiff had received $9,000 in workmen's compensation under Murray, the employee would have to pay $9,000 over to the employer out of his $10,000 recovery, leaving him with a total recovery of compensation plus damages of only $10,000.
>
> "On the practical and policy side, the prime defect of the Murray result is that there is no rational relation between the fifty percent reduction in plaintiff's recovery and the interests of either the employee or the employer. Let us go back to the facts of the Kittleson case with which this section opened. The compensation liability there was $6,800 and the third-party recovery was $60,000. If this situation were to arise under the Murray case, the plaintiff, instead of recovering $60,000 and reimbursing the employer for $6,800, thus retaining $53,200, would recover only $30,000 from the third party, plus his $6,800 compensation, for a total of $36,800--in spite of the fact that at the trial he must be assumed to have established actual damages of $60,000. By what conceivable logic can he be told that he should absorb a loss of $16,400 for the benefit of the third-party tortfeasor?
>
> "A rule capable of producing such a result is clearly unacceptable, particularly since its legal

a judicial apportionment of damages concept onto the situation of the workmen's compensation third-party suit where the injury occurred partially as a result of the negligence of the compensation employer. See the thorough review of this problem in 2A Larson, §§ 75.22-75.23; 76.00 et seq.; 77.00 et seq.

5. To create judicially an "apportionment of damages" doctrine into § 905(b) cases may greatly undercut major congressional policy considerations underlying the 1972 Amendments without providing adequate replacements for them. For instance, a major complaint of longshoremen's labor representatives in the Senate and House hearings considering the 1972 Amendments to §§ 933 and 905 was that most vessels upon which these men worked were of foreign registry and, thus, did not adhere to American safety standards under OSHA and other maritime safety statutes and regulations. Congress may have felt that, in allowing a longshoreman to recover full damages against the vessel without regard to the relative fault of the stevedore, a practical incentive would be provided for these vessels and their owners to adhere to American safety standards. Also, formulating the "rules" for uniform results under an "equitable credit" doctrine may well exceed the courts' Article III power. A court-created apportionment doctrine would be without a well formulated struc-

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10. (continued)
underpinnings are just as unsound as its practical result."
2A A. Larson, The Law of Workmen's Compensation, § 76.22 at pp. 14-318 to 14-319 (Release No. 17, 1974) (hereinafter cited as 2A Larson).

ture.[11] If the result of § 905(b) is unfair to the vessel owner, he should apply for relief to the Congress and not to this court.

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11. United States v. Reliable Transfer, 421 U. S. 397 (1975), involved the abrogation of a completely court created rule. Applying that case to § 905(b) cases would be engrafting an apportionment of damages remedy onto a complex and carefully thought out statutory structure with which the Congress intended to fix the rights of the stevedore, vessel owner, and longshoreman. See also Moragne v. States Marine Lines, Inc., 398 U. S. 375, 388-408 (1970); Gilmore & Black, §§ 6-31 to 6-33, 7-20; 2A Larson, §§ 76.00 et seq.

United States Court of Appeals

for the Third Circuit

No. 76-1383

MILTON MARANT

vs.

FARRELL LINES, INC.,
Appellant

(D. C. Civil Action No. 73-2615)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: VAN DUSEN, BIGGS and ALDISERT, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court ~~that the judgment of the said District Court be, and the same is hereby~~ that the judgments of the said District Court filed July 28, 1975 and January 19, 1976, be, and the same are hereby reversed and the cause is remanded for further proceedings in accordance with the opinion of this Court. Costs taxed against the appellee.

ATTEST:

Thomas C[illegible]

January 31, 1977

FTI—88—4-16-73—2M—1127

service of two copies of
the within
hereby admitted this 2nd day
of March, 1977

Zimmerman & Zimmerman
Attorney for Plaintiff-Appellee